No. 88-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,

Petitioner

v.

KERN OIL & REFINING CO.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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October 15, 1988

QUESTIONS PRESENTED

Jurisdiction to Enter Findings of Fact and Conclusions of Law

1. Do the particular facts of this case except it from the general rule that the filing of a notice of appeal divests the district court of jurisdiction?

2. Does the Ninth Circuit's decision excepting this case from that general rule conflict with the holding of any other Court of Appeals?

Denial of Pretrial Motion for Disclosure

1. Should this Court consider Tenneco's First Amendment argument when that issue was not raised in the district court on Tenneco's pretrial motion or argued in the Court of Appeals? Should this Court consider Tenneco's Rule 26 argument when that issue was not raised in the Court of Appeals?

2. Can the decision of the Ninth Circuit create a conflict on issues it does not address?

3. Should this Court review issues that are irrelevant to the outcome of this case?

4. Do the particular facts of the pretrial disclosure issue in this case present a question of general applicability warranting review by this Court?

RULE 28.1 STATEMENT

Respondent Kern Oil & Refining Co. has no subsidiaries that are not wholly owned and is not a subsidiary or affiliate of any other company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kern Oil & Refining Co. ("Kern") respectfully urges the Court to deny the Petition for Certiorari filed by Tenneco Oil Company ("Tenneco"). The Petition presents issues not preserved in the courts below, presents no conflicts among the Circuits, and presents no issues of general application or national importance. The case involves substantive and procedural facts not likely to recur, and was correctly and fairly decided below. Review by this Court is not warranted.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Tenneco's Petition neither truthfully nor fully sets forth the pertinent events in either the courts below or in the Department of Energy. This case turns on its facts, and Tenneco's inaccurate and incomplete presentation of the material facts below is in itself reason to deny the Petition. Sup. Ct. Rule 21.5. The true facts tell quite a different story and demonstrate that this is not a case warranting the exercise of this Court's certiorari jurisdiction.

Briefly stated, the material facts regarding the district court's entry of its Findings of Facts and Conclusions of Law are as follows: After the district court had ruled on both liability and damages, Kern, at the court's direction, prepared a proposed order and judgment and proposed findings of fact and conclusions of law. Tenneco filed an exhaustive, *120-page opposition* to the proposed findings and conclusions. Three weeks later, the district court signed the Findings and Conclusions, making only minor corrections and *no substantive changes* except one favoring Tenneco. *The district court signed both the Findings and Conclusions and the Order and Judgment on the same day—October 10, 1986.* Due to what can only be *clerical error*, the Order and Judgment was filed on November 3 and entered on November 5, but the Findings and Conclusions did not find their way into the record until November 24, after having been filed on November 21. Tenneco filed its Notice of Appeal on November 21. *The appeal was docketed in the Ninth Circuit on December 12*, three weeks after the Findings and Conclusions had been entered.

Tenneco's presentation of the facts regarding the district court's handling of the disclosure of discovery documents deceptively mixes together the events and the legal positions taken by the parties with respect to three different matters: (1) Tenneco's April 1985 pretrial motion for disclosure, which was *denied*; (2) the January 1986 trial closure, *to which Tenneco did not object*; and (3) Tenneco's July 1986 post-trial motion to unseal the trial record, which was *granted*. Obviously, Tenneco's grievance here can relate only to the district court's denial of its pretrial motion. Review, however, can properly be sought only of the legal issues

raised below. Contrary to the implications of the Petition, Tenneco did not raise the First Amendment issue in the district court until its successful *post-trial* motion to unseal the trial record, and Tenneco did not argue either the First Amendment or Rule 26 of the Federal Rules of Civil Procedure in the Ninth Circuit. Consequently, the Ninth Circuit did not rule on these issues.

Tenneco—itself having been found liable below for fraud (as well as for intentional violation of federal regulations and breach of contract)—tries in its Petition to portray Kern as a malefactor that has "defrauded" the Department of Energy and thus the American public. As Tenneco well knows, Kern did no such thing. It is particularly offensive that Tenneco, in its second "Question Presented," says that the DOE "found" Tenneco's allegations of fraud "to be true." *The DOE does not accuse Kern of fraud and has specifically disclaimed any such accusation.* Characterization aside, the administrative complaint against Kern, which Tenneco implies is a final agency decision, is based on a legal theory that was conceived by the DOE's enforcement arm long after the period at issue here and is closely related to a DOE legal theory that has been rejected on constitutional and other grounds in its first and only interpretation beyond the agency level. In fact, Kern followed the applicable regulations and did not "cheat" the Department of Energy or anyone else.

Tenneco has doggedly pursued the "fraud" issue in the district court, the DOE, the Ninth Circuit Court of Appeals, the Temporary Emergency Court of Appeals, and now here. Tenneco has never had a legitimate reason to do so—it was not a party to the questioned transactions, and their validity can have no effect on the damages Tenneco must pay in this case. Tenneco's actions in this respect are, and always have been, brought for reasons of retaliation and harassment, not out of any genuine sense of public responsibility.

II. STATEMENT OF FACTS

The district court found Tenneco liable for willful violation of federal regulations, intentional breach of contract, and fraud and misrepresentation, all arising out of Tenneco's conduct from mid-1978 through the end of 1980 in refusing to honor its obligations

to supply Kern with 2.8 million barrels of valuable high-gravity "light" crude oil from Tenneco's Yowlumne, California field. The court awarded Kern $16,761,639 in lost profits damages plus equitable prejudgment interest and (pursuant to the applicable state law) attorneys' fees on its contract claims. Pet. App. 50a, 53a.[1]

Kern's damage claim sought recovery of the profits it would have made refining 1.8 million barrels of the high value Yowlumne crude if Tenneco had met its regulatory and contractual supply obligations. In calculating such profits for its fiscal year April 1979-March 1980, Kern assumed that it would not have had to purchase "entitlements" to refine that portion of the Yowlumne crude which was price-controlled because the DOE declared Kern eligible for $26 million in "exception relief."[2]

Discovery in this litigation was conducted pursuant to a negotiated protective order which provided, among other things, that discovery materials would "not be disclosed for any purpose other than in connection with the litigation of these cases." Pet. App. 84a. In early April 1985, eight months before trial, Tenneco announced to Kern that its review of documents that Kern had produced in discovery led it to believe that Kern, in unrelated transactions not involving Tenneco, had "cheated" the entitlements program out of $28 million. Tenneco claimed to be interested in these transactions because, Tenneco said, if the DOE knew of these transactions, it would revoke the exception relief on which Kern relied to compute its damage claim in this case. Tenneco asked Kern to consent to Tenneco's disclosure of those documents to the DOE so it could seek revocation of Kern's exception relief, threatened to bring a separate federal court action against Kern, and presented Kern with a demand that Kern pay $28 million to *Tenneco*, which was not involved in the questioned transactions,

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[1] The abbreviation "Pet. App." as used herein refers to the Appendices to Tenneco's Petition. The term "Opp. App." refers to the Appendices to this Brief in Opposition.

[2] Entitlements, designed to even out the cost of crude to refiners, were essentially surcharges for refining price-controlled crude oil; exception relief, designed to aid small refiners whose profits had been considerably reduced because of the cost of crude, excused a refiner from having to purchase entitlements up to the amount of eligibility. The entitlements program ended in 1981.

was not harmed in any way by them, and had no legitimate basis for its monetary demand. Ct. App. ER 652-53.[3]

After investigating the facts and the law, Kern declined to consent to disclosure or to pay any money to Tenneco, denying that it had done anything unlawful and pointing to DOE precedent that showed Kern's third party dealings could have no effect on this lawsuit as well as to a satisfactory 1981 DOE entitlements compliance audit of Kern in which the DOE had reviewed many (concededly, not all) of the documents Tenneco sought to disclose. Nevertheless, on April 19, 1985 Tenneco filed a motion to lift the protective order so it could turn the discovery documents over to the DOE. In its motion papers (and in every subsequent paper it filed on the disclosure issue until DOE action proved Tenneco wrong) Tenneco claimed it needed disclosure because the DOE supposedly would revoke the exception relief relied upon by Kern in its damage calculation. Neither at this nor at any other time until five and a half months after the trial had ended, in its *successful* July 1986 post-trial motion to unseal the trial record, did Tenneco assert any First Amendment right.

Kern opposed the pretrial disclosure motion on the grounds, *inter alia*, that Kern had committed no wrong, that Kern's transactions with third parties could have no effect on Kern's damage claim against Tenneco as shown by DOE precedent, and that Tenneco's motion and earlier unjustified demand abused the discovery process, violated 10 C.F.R. § 210.61 (prohibiting retaliatory actions in the context of the federal regulatory program) and violated Rule 11 of the Federal Rules of Civil Procedure.[4]

Kern did not argue "that Tenneco should be bound by the umbrella protective order even in the absence of good cause,"

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[3] "Ct. App. ER" refers to the Excerpts of Record filed with the Ninth Circuit Court of Appeals in this case.

[4] Tenneco's motivation appears to be rooted in Kern's prior successful efforts to redress wrongs. As a result of a 1979 DOE petition filed by Kern complaining about Tenneco's violations of the crude oil allocation regulations, the DOE issued a Proposed Remedial Order to Tenneco, which was resolved in 1981 by Tenneco's entry into a Consent Decree under which Tenneco paid $15 million to the DOE. In July 1984 Kern obtained a $3.6 million judgment against Tenneco in the district court for overcharges in sales of crude oil. In September 1984 the district court in that overcharge case dismissed Tenneco's counterclaims; in December 1984 the district court in this case dismissed identical Tenneco counterclaims on *res judicata* grounds.

Petition at 4. Nor did the district court shift the burden to Tenneco on the disclosure issue. *Id.* at 23-26. The district court's May 15, 1985 order directed Kern to provide a showing of good cause why the documents should be protected from disclosure. Kern argued that good cause was established by a line of directly applicable decisions led by *GAF Corporation v. Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976). Ct. App. ER 715. Those cases hold that a party which has received documents in the course of discovery in a lawsuit with the understanding that they were to be used solely for that litigation cannot voluntarily disclose those documents to a government agency for purposes of the agency's investigation of the party which produced the discovery. Kern also argued that Tenneco's abuse of the discovery process and bad faith in bringing the motion and in attempting to extort money from Kern was good cause to deny the motion.

As shown by the district court's September 6, 1985 and September 25, 1986 Orders, Pet. App. 24a, 46a, the district court interpreted the "good cause" language of Fed. R. Civ. P. 26(c) as meaning "confidential." Finding that the documents were not confidential, it therefore found that Kern had not shown "good cause." However, the court also said it fully agreed with the *GAF* line of cases, Pet. App. 26a, and, holding Tenneco bound to the terms of its agreement, *id.* 26a-27a, denied Tenneco's pretrial motion for disclosure, *id.* 28a-30a.

The district court permitted Tenneco to present at trial its evidence purporting to establish that Kern violated DOE regulations in the third-party transactions and that that conduct somehow affected this case[5]. When Tenneco indicated that it was about to present such evidence, Kern asked that the courtroom be closed and the trial record sealed. The district court granted that request. Tenneco seems to assign this as error, Petition at (i), 4-6, 16, 25-26, 28, but omits to note that *when Kern made its request, Tenneco's counsel stood mute* and made no objection whatsoever to the closure. Pet. App. 46a.

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[5] The district court precluded the testimony of one Tenneco witness pursuant to local rules because Tenneco had neither identified that person as a witness on a matter which had been "in issue . . . from day one" nor made him available for deposition.

Tenneco argued at trial its by then familiar refrain that the DOE, if it knew of the third-party dealings, would revoke Kern's 1980 exception relief. Kern responded as before—that it had committed no violation and that in any event its third-party transactions could have no bearing on the amount of Tenneco's liability in the case before the court. Kern referred the district court to *USA Petroleum Company*, 12 DOE ¶ 82,503 (1984), a DOE decision showing that even if it believed Kern had acted improperly, it would not revoke Kern's exception relief (although it might take remedial action). The district court found not only that Kern had done nothing unlawful, but also that even if the transactions had been wrongful, the DOE would not revoke Kern's exception relief. Pet. App. 76a.

Tenneco also argued in the courts below that the evidence showed it would not have been in Kern's economic interest to refine the Yowlumne crude. It reargues that factual issue here, claiming that "the cost of entitlements increased the cost of oil to Kern so substantially that Kern would not have rationally purchased and refined" the Yowlumne crude. Petition at 3. Tenneco's expert, however, conceded on cross-examination that it would have been profitable for Kern to refine the light high-gravity Yowlumne crude *even if Kern had to pay associated entitlements costs.* RT 14C:8. Kern also showed that it had more than enough unused exception relief eligibility to cover any entitlements obligations associated with the nondelivered Tenneco crude *plus* any entitlements costs arguably owed for the crude involved in the questioned third-party transactions, RT 16B:125-28, RT 16C:3-5, and Tenneco's expert admitted that if Kern's entitlement purchase obligations would not exceed the amount of Kern's exception relief eligibility, there would be no effect on Kern's damage claim, RT 14C:25. Tenneco's other expert, who attempted to demonstrate that Kern's refinery was incapable of processing the Yowlumne crude and that it was Kern's practice to sell crude of quality comparable to the Yowlumne crude, was found by the district court to have distorted the facts and given misleading testimony. Pet. App. 41a-42a, 54a, 62a, 75a. As the Ninth Circuit later described it, there was a "great deal" of evidence before the district court, most of it highly technical,

showing that Kern would "rationally" have refined the Yowlumne crude.[6]

Trial of the bifurcated damages phase ended on January 17, 1986; post-trial briefing and closing arguments were concluded by February 12. The district court then took the question of damages under submission. Although Tenneco's Petition implies that it moved immediately after trial to unseal the trial record and that it did so more than once, Petition at 5, Tenneco did not in fact bring its motion until July 2, 1986, almost six months after closing arguments. As noted, that motion was successful. In that post-trial motion Tenneco *for the first time* asserted a First Amendment right to petition the government.

On September 25, 1986, the district court issued its order allowing disclosure of the trial transcript and those documents admitted as trial exhibits but delaying its date of effectiveness to allow Kern to take what turned out to be an unsuccessful appeal of the order. On October 8, the day the order became effective, Tenneco ran to the DOE's Office of Hearing and Appeals ("OHA") with the documents, the trial record and a "Petition for Special Redress." Tenneco's Petition here fails to inform this Court that *Tenneco's DOE petition specifically sought revocation of Kern's 1980 exception relief*, Ct. App. ER 4451, and that, as the district court and Kern had correctly predicted, *OHA rejected Tenneco's petition*, Ct. App. ER 4575. Declaring that a remedial proceeding was the more appropriate proceeding in which to evaluate whether Kern had violated the regulations, and noting the "attenuated relationship" between Tenneco's grievance and Kern's alleged violations, OHA refused to reopen the question of Kern's 1980 exception relief. *Id.*

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[6] The evidence included detailed documentation and testimony as to, *e.g.*, crude oil quality and price category classification; entitlements costs; transportation costs; crude oil sales and exchanges; inventory turnovers; chemical engineering matters regarding the equipment at Kern's refinery and whether it could physically process high API gravity crude oil; operating costs; what products, in what percentage, and of what value could be refined from particular mixtures of crude oil; market prices for refined products; and crude oil accounting. The district court found that "every element of Kern's damage claim [was] thoroughly documented in the evidence," and that it would have been "sound business practice" for Kern to refine the Tenneco Yowlumne crude. Pet. App. 42a, 74a, 62a.

Instead, on March 31, 1987, DOE's enforcement arm, the Economic Regulatory Administration ("ERA"), issued a Proposed Remedial Order ("PRO") seeking a $25 million refund, plus interest, from Kern. A PRO, as Tenneco well knows, is nothing more than an administrative complaint. The PRO issued to Kern is based on a legal theory that ERA developed well after the period at issue here and which is closely related to a DOE theory that was rejected the only time it has been addressed beyond the agency level. Magistrate's Report and Recommendation, *Canal Refining Co. v. United States Department of Energy*, Case No. 87-C-294-E (N.D. Okla.) (April 26, 1988).

The outcome of the DOE refund proceedings commenced by the issuance of the PRO can have no effect whatsoever on this lawsuit, and, even if the DOE should order Kern to refund any sums and that order were affirmed on appeal, Tenneco would not be entitled to any portion of those sums. Tenneco never had any legitimate reason for pursuing this issue—not in the district court, not in the DOE, not in the Ninth Circuit, not in the Temporary Emergency Court of Appeals,[7] and not here. *See* n.4, *supra*.

Meanwhile, on August 26, 1986, the district court issued its Memorandum of Decision awarding Kern its lost profit damages. (The court had issued an oral ruling on liability issues at the close of that phase of the trial.) In the Memorandum of Decision, the district court stated that it did not purport to address therein all issues that had been raised, and directed Kern to prepare a proposed order and judgment and proposed findings of fact and conclusions of law "on all material issues involved." Pet. App. 41a, 45a. Kern, on September 5, accordingly submitted a proposed order and judgment and findings and conclusions, and—another fact conspicuously omitted from the Tenneco Petition—Tenneco, on September 22, filed a *120 page objection* to the findings and conclusions proposed by Kern. Ct. App. ER 4430. The district court's next action—again inexcusably not mentioned in the Tenneco Petition—

[7] Appeal in this case was bifurcated due to TECA's exclusive appellate jurisdiction over Kern's regulatory cause of action against Tenneco. TECA stayed proceedings there pending the decision of the Ninth Circuit on Kern's breach of contract and fraud claims. Tenneco, dissatisfied with the Ninth Circuit's decision on disclosure, has raised precisely the same arguments in TECA that it raised in the Ninth Circuit.

was to sign *both* the Order and Judgment *and* the Findings and Conclusions three weeks later, on October 10. Pet. App. 52a, 80a.

As the Ninth Circuit found, it was clearly the intent of the district court that both documents be filed at the same time. Pet. App. 7a. However, because of what can only be clerical oversight, the Order and Judgment was filed on November 3 and entered on November 5, but the Findings and Conclusions were not filed until November 21 or entered until November 24. Between November 5, when the Order and Judgment was entered, and November 21, when Tenneco filed its notice of appeal, Tenneco did not inquire of the district court regarding the status of the Findings and Conclusions, did not bring a Rule 59(b) motion for a new trial, and did not ask for an extension of time to bring a Rule 52 or 59 motion or to bring its appeal. Indeed, Tenneco did not even wait the allowable 30 days before filing its notice of appeal. Tenneco argued in the Ninth Circuit that it had been deprived of the opportunity to move for a new trial or for amended Findings and Conclusions or an amended judgment, but the Ninth Circuit, "unpersuaded" by Tenneco's arguments, found that Tenneco's non-action showed it "was unconcerned about the deadlines for a Rule 52 or 59 motion and suffered no harm by the late filing." Pet. App. 7a.

As indicated, Tenneco filed its Notice of Appeal on November 21, the same day the Findings and Conclusions were filed. *However, the appeal was not docketed in the Ninth Circuit until December 12*, a highly material fact that Tenneco's Petition ignores. The district court thus entered its Findings and Conclusions well within the period allowed under Fed. R. Civ. P. 60(a) for correcting clerical mistakes arising from oversight or omission. Opp. App. 13a.

Apart from one change adverse to Kern, the Findings and Conclusions as signed by the district court contain no substantive changes from the findings and conclusions which Kern had proposed and to which Tenneco had so strenuously objected. As Tenneco itself stated in its Ninth Circuit opening brief,

> Out of 35 pages of text, the district court made only 5 changes. The court lined out the word "proposed" from the caption of the document; changed the word "large" to "larger" in Finding No. 5; altered the structure of a sentence in Finding No. 12;

corrected the spelling of the word "laches" in Conclusion No. 37; and drew an "x" through Conclusion No. 60.[8]

Tenneco appealed a great many issues to the Ninth Circuit, among them the district court's jurisdiction to enter the Findings and Conclusions and the effect on the damage award of the district court's denial of Tenneco's pretrial disclosure motion. The Court of Appeals, in an opinion by Judge Sneed, affirmed on all counts. In affirming the jurisdiction of the district court to enter the Findings and Conclusions, the Court of Appeals distinguished this case on its particular facts while validating its earlier decision in *Sumida v. Yunen*, 409 F.2d 654 (9th Cir. 1969), a case on all fours with the general rule set forth in the decisions of other circuits Tenneco relies on here. Pet. App. 7a. The panel noted Tenneco's lengthy opposition to the proposed findings and conclusions, the fact that "the district court did not attempt to move the target" (*i.e.*, there were no substantive changes) and the district court's evident intent that the Findings and Conclusions be filed at the same time as the Order and Judgment. *Id.*

On the disclosure issue, Tenneco stated the question and captioned those portions of its Ninth Circuit briefs in terms of First Amendment rights and occasionally used the words "First Amendment," but it *never discussed* this constitutional issue, Opp. App. 1a-12a,[9] a fact that did not escape the notice of the Ninth Circuit panel. Pet. App. 16a n.10. Nor did Tenneco even mention Fed. R. Civ. P. 26 or "good cause." It did not cite a single one of the thirty-plus authorities it relies on here. Instead, Tenneco argued to the Ninth Circuit that the district court's damage award was necessarily erroneous. Tenneco claimed that the DOE would have revoked Kern's exception relief and, selectively quoting excerpts from the PRO and from Kern's Statement of Objections to the PRO, asserted that Kern either would not have refined the Yowlumne crude or would have evaded entitlements obligations on that crude.[10]

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[8] Proposed Conclusion No. 60 had provided for continuing confidentiality of trial testimony, exhibits and arguments wholly derived from discovery.

[9] Because Tenneco's Ninth Circuit briefs are so lengthy, Kern appends hereto only those portions in which Tenneco addressed the disclosure issue.

[10] As noted, *supra*, the identical arguments have now been made to TECA. Kern's position before TECA is that this issue is not properly before it, for many reasons.

Tenneco submitted Kern's DOE Statement of Objections to the Ninth Circuit after Kern had already submitted its Ninth Circuit appellee's brief. Kern therefore did not have the opportunity to brief in the Ninth Circuit Tenneco's allegations of inconsistent positions. We do so here. Contrary to Tenneco's statement, Petition at 8, Kern *never* said to the DOE "that it would not have refined any additional price controlled Tenneco oil." Kern's statements in the DOE proceedings are wholly consistent with its statements and the evidence at trial; Kern told the DOE that the crude oil Kern would have sold and not refined was "primarily low-gravity," "severely disadvantaged" price controlled crude oil—heavy crude of considerably less value than the "light" high-gravity, high quality Tenneco Yowlumne crude at issue in this case. Kern never said anything about Tenneco oil in its DOE Statement of Objections.[11]

The Ninth Circuit, affirming the district court's decision on the pretrial disclosure issue, stated:

> Tenneco argues that because the district court did not allow it to reveal these documents to the DOE until after the trial, the court based its award of damages on incorrect assumptions as to Kern's rights [sic] to purchase entitlements. The short answer to this argument is that the district court allowed Tenneco to produce at trial the evidence it later submitted to the DOE. Kern argued at trial that even if the Department of Energy held that Kern had acted unlawfully it would not revoke Kern's unused exception relief eligibility, which excused Kern from having to purchase entitlements for the Yowlumne oil. The district court therefore had this dispute directly before it. We cannot say that its resolution of the dispute was unsupported by the evidence.

Pet. App. 16a. It also noted Tenneco's arguments about Kern's post-trial statements to the DOE and, assuming that Kern's statements had been inconsistent, nonetheless upheld the district

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[11] Kern does not deny that some of the crude involved in the questioned third party transactions was Yowlumne. The district court had before it Tenneco's evidence that such was the case, but nonetheless reached its conclusion as finder of fact that Kern would have refined the 1.8 million barrels of withheld Yowlumne crude claimed in Kern's damage calculation.

court's decision, pointing to the "great deal of evidence [before the district court] on how Kern would have disposed of the oil it did not receive." *Id.* 17a.

On March 21, 1988 Tenneco petitioned the Ninth Circuit for rehearing and suggested rehearing en banc. On May 19, the Ninth Circuit denied rehearing and, with no judges requesting a vote, rejected the suggestion for en banc reconsideration. *Id.* 22a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Tenneco Question No. 1: Jurisdiction to Enter Findings of Fact and Conclusions of Law.

A. The Circumstances Surrounding the Entry of the Findings and Conclusions Here Are Unusual and Not Likely to Recur.

A unique confluence of facts surrounds the district court's Findings and Conclusions. As noted, Tenneco's Petition omits important parts of the story: (1) that it filed an exhaustive 120-page opposition to the proposed findings and conclusions; (2) that the Findings and Conclusions, as entered, made no substantive changes from the proposed findings and conclusions to which Tenneco had so strenuously objected; (3) that the district court signed both the Order and Judgment and the Findings and Conclusions on the same day, intending, as the Ninth Circuit found, that they be filed simultaneously; and (4) that the Findings and Conclusions were entered three weeks before the appeal was docketed. While we will never know exactly what happened to the Findings and Conclusions in the in-boxes and out-boxes of the district court between October 10, when they were signed, and November 21, when they were filed, it seems clear that some sort of clerical oversight caused the delay. Tenneco took no steps to move for a new trial or an amended judgment or to protect its rights to bring a motion under Rule 52(b); as the Ninth Circuit found, Tenneco was "unconcerned about the deadlines for [such] motions and suffered no harm by the late filing." Pet. App. 7a. The chances that such a combination of circumstances would ever again converge in one case are highly remote.

B. On the Facts of This Case, the District Court Had Jurisdiction to Enter the Findings and Conclusions, and There Is No Conflict of Circuits.

The Ninth Circuit, recognizing the unique factual situation before it, accepted and relied on the district court's Findings and Conclusions. It observed that a notice of appeal "usually divests the district court of jurisdiction," Pet. App. 6a, but distinguished this case from that general rule. This case and those which Tenneco argues are "in error," Petition at 12-13, demonstrate exceptions to that general rule. The conflict of Circuits contrived by Tenneco is nothing more than the difference between the general rule and its exceptions, both of which are uniformly applied in the various United States Courts of Appeals.

The general rule that jurisdiction is transferred upon the filing of a notice of appeal remains the rule in the Ninth Circuit as elsewhere. *See, e.g., McClatchy Newpapers v. Central Valley Typographical Union*, 686 F. 2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); *Davis v. United States*, 667 F. 2d 822, 824 (9th Cir. 1982); *Sumida v. Yunen*, 409 F.2d 654 (9th Cir. 1969), *cert. denied*, 405 U.S. 964 (1972). Tenneco admits, as it must, that there are exceptions to that general rule, including jurisdiction to act in aid of the appeal and to act under specific authority such as Fed. R. Civ. P. 60(a), which authorizes the district court to correct clerical mistakes until the time the appeal is docketed. Petition at 9. *See, e.g., Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986); *Ced's, Inc. v. United States Environmental Protection Agency*, 745 F.2d 1092, 1095 (7th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F. 2d 298, 299 (5th Cir. 1984), all cases relied upon here by Tenneco that recognize the existence of these exceptions. Tenneco argues that the district court in this case "crafted" a "new" exception. Petition at 9, 10. To the contrary, this case falls squarely within the acknowledged exception provided by Rule 60(a) and presents other facts taking it outside of the general rule.

Rule 60(a) specifically authorizes the district court to correct clerical errors arising from oversight or omission at any time *until the appeal is docketed* in the Court of Appeals, and thereafter with

the permission of the appellate court. Opp. App. 13a. The district court's Findings of Fact and Conclusions of Law here were filed on November 21, 1986, and entered on November 24. Tenneco's appeal was filed on November 21, but was not docketed in the Ninth Circuit until three weeks later, on December 12. "Filing is not the same as docketing," *United States v. Statchuk*, 682 F.2d 466, 467 (4th Cir. 1982), and the filing of a notice of appeal "does not divest the district court of power to make corrections under Rule 60(a)," *id.* at 467-68. The district court thus retained jurisdiction to correct its clerical mistake.[12] There was no possibility here that the entry could "throw off the appellate timetable," Petition at 14, and no "attempt to assert jurisdiction simultaneously," *id.* at 9.

Rule 60(a) is premised on the principle that the record should reflect what was intended by the district court. *Chavez v. Balesh*, 704 F.2d 774, 776 (5th Cir. 1983); *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976); *Pattiz v. Schwartz*, *supra*, 386 F.2d at 303. Here, the Ninth Circuit found it "clear . . . that the findings and conclusions were intended to be filed at the same time as the final judgment." Pet. App. 7a.

In *Pattiz v. Schwartz*, an amended complaint had been accepted by the district court but was never entered in the record. When the omission was discovered, the district court ordered that the record be corrected. The Eighth Circuit, in an opinion by then-Judge Blackmun, upheld the validity of that order:

> What the court here was effectuating, it seems to us, was nothing more than the correction in the formal record of a gap or error "arising from oversight or omission," within the definite and positive language of Rule 60(a)'s first sentence. The intent of the parties and, indeed, of the trial court itself, is clear . . . . [The district court's] action "would result simply in the record speaking the truth." . . . The district court by its order recognized only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending.

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[12] In circumstances such as these, the term "clerical mistake," as used in Rule 60(a), can apply to mistakes made by either the district court judge or the clerical staff. *Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968).

386 F.2d at 303.

The cases relied upon by Tenneco, with one exception,[13] are not instances of clerical mistake and therefore do not fall within the Rule 60(a) exception to the general rule. Moreover, Tenneco fails to observe that in many of them, the district court's action was taken after the appeal had been docketed. For example, Tenneco relies on language from *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1326 (5th Cir. 1985), Petition at 11, but completely ignores two references in the same paragraph to the fact that the appeal there had been docketed. *See also Generes v. Bonnemer*, 74 U.S. (7 Wall.) 564 (1869); *Venen v. Sweet*, 758 F.2d 117 (3d Cir. 1985); *Ced's v. EPA*, *supra*, 745 F.2d 1092; *Gormong v. Local Union 613*, 714 F.2d 1109 (11th Cir. 1983).

The district court's entry of the Findings and Conclusions here was also unquestionably "in aid of the appeal." In its December 18, 1985 oral ruling on liability, the district court said:

> These comments that I'm going to make are not going to be definitive, nor are they going to be complete in all particulars. So I put that caveat in because on another occasion, I did make some comments when I ruled from the bench, and the briefs, then, came back saying that I hadn't discussed this, and I hadn't discussed that. Therefore, whatever arguments flowed from it. So I don't want anybody to get the impression that this short time that I'm going to take will address every question that's been raised.

Pet. App. 33a. Again in its August 28, 1986 Memorandum of Decision ruling on damages, the district court stated:

> The points addressed in this memorandum do not purport to be an exhaustive discussion of all the issues raised during the trial, but they will be discussed for the purpose of indicating the bases of the Court's decision .... [T]hese comments are not intended to be exhaustive of all issues raised by the parties hereto, but are designed to summarize some of the bases of the Court's decision.

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[13] In *Gormong v. Local Union No. 613*, 714 F.2d 1109 (11th Cir. 1983), there was an obvious clerical mistake, but the district court did not seek to correct it until after the appeal had been docketed; thus the case did not fall within Rule 60(a).

Pet. App. 41a, 45a. The Court then expressly directed Kern to prepare proposed findings and conclusions "on all material issues involved." Pet. App. 45a.

The very purpose of findings is "to aid appellate courts in reviewing the decision below." *Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943), *quoted by* the Advisory Committee on Civil Rules in connection with the 1946 amendment of Fed. R. Civ. P. 52. *See Hybritech, Incorporated v. Abbott Laboratories*, 849 F.2d 1446, 1450 (Fed. Cir. 1988) (reduction of oral ruling into written findings and conclusions "aids our review"); *Silverthorne v. Laird*, 460 F.2d 1175, 1178 (5th Cir. 1972) (written opinion "amplifying" and not contradicting earlier oral rulings held of "great aid" to appellate court, enabling it to "examine the case with a thorough understanding of the lower court's posture").

Moreover, here Tenneco took full opportunity to object at length to the proposed findings and conclusions, and the Findings and Conclusions as entered by the district court contained no substantive changes from the proposed findings and conclusions. On this basis, the Ninth Circuit distinguished this case from *Sumida v. Yunen*, *supra*, where the district court had filed *amended* findings and conclusions after appeal had been taken.[14] As the Ninth Circuit put it,

> The appellate court is entitled to review a fixed, rather than a mobile, record. Here the district court did not attempt to move the target; it merely set one in place.

Pet. App. 7a. Many of Tenneco's authorities do not apply here for the reason that the district court in those cases had "moved the target." *See, e.g., Generes v. Bonnemer*, 74 U.S. (7 Wall.) 564, 565 (1868); *Ced's v. EPA*, *supra* (rejecting supplemental opinion on ground that "the parties to an appeal are entitled to have a stable set of conclusions of law on which they can rely"); *Beliz*, *supra*; *cf. United States v. Aluminum Company of America*, 2 F.R.D. 224 (S.D.N.Y. 1941). In none of these cases did or would the losing party have an opportunity to object such as Tenneco did here.

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[14] Tenneco heavily relied on *Sumida v. Yunen* in the Ninth Circuit. It does not even cite that case here.

The facts in *Under Sea Industries, Inc. v. Dacor Corp.*, 833 F.2d 1551 (Fed. Cir. 1987), are in some respects similar to the facts here. (We could find *no* case presenting all the material factual elements of this case.) In *Under Sea*, as here, the district court made it clear that its oral ruling was not intended to constitute its formal findings, and directed the prevailing party to prepare proposed findings. The losing party objected to many of them. The court had the proposed findings before it for several weeks, and there was every indication that it gave them careful consideration. Although the findings were not entered until after appeal had been taken from the judgment, the Federal Circuit Court of Appeals, applying Seventh Circuit precedent, held that the general rule ousting the district court of jurisdiction upon the filing of a notice of appeal "is not inflexible or immutable . . . 'where a fair construction of the Federal Rules of Civil Procedure so requires.' " 833 F.2d at 1555. It stated that it knew of "no sound reason why the filing of the notice of appeal should have barred the district court from signing the findings and conclusions it intended to enter." *Id.*

Silverthorne v. Laird, supra, while dissimilar in some respects, is nonetheless instructive. There, two days before oral argument on the appeal, the district court entered a written opinion wholly consistent with the earlier order appealed from and thoroughly discussing the rationale for that order. The Fifth Circuit held that the opinion was of great aid to it in understanding the lower court's reasoning. However, because of the proximity of oral argument, the Court of Appeals gave the parties opportunity to file briefs discussing the written opinion. 460 F.2d at 1179. Tenneco, of course, has already had that opportunity.

Finally, we note that many of the cases on which Tenneco relies are simply not applicable here. Tenneco's Petition puts its primary reliance on *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), both of which deal with whether a notice of appeal is defective under Fed. R. App. P. 4(a)(4) where a Rule 59 motion has been timely made. The broad statements of *Griggs* and *Marrese* are not applicable here. Tenneco's reliance on the "bright line rule" of *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), Petition at 10, is

especially inappropriate. The issue in *Budinich* was "whether a decision on the merits is a 'final decision' as a matter of federal law under [28 U.S.C.] § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined." 108 S. Ct. at 1720, 1722. *Budinich* and its bright line rule do not control in the very different circumstances here.

C. Reversal of the Decision Below Would Lead Only to Wasteful Re-Review of the Same Issues by the District Court, the Ninth Circuit and This Court.

Tenneco repeats here its plaint that it was deprived of the opportunity to move to amend supposedly erroneous findings and conclusions.[15] But given the fact that no substantive change was made in the Findings and Conclusions subsequent to Tenneco's blunderbuss objection, one wonders what Tenneco could have raised that it had not already argued to the district court. Obviously, Tenneco's after the fact statement, Petition at 15-16, that it was prepared to raise two new legal arguments it had not thought of before can be given no credence.[16] As the Ninth Circuit observed, "[t]o remand to the district court to enable Tenneco to file still another opposition, styled a motion to amend, to the same findings and conclusions would be pointless." Pet. App. 7a.

The Ninth Circuit aptly described the result advocated by Tenneco as "needless paper-shuffling." *Id.* There is no reason to believe that if the case were sent back to the district court, the Findings and Conclusions would be any different. Tenneco presumably would then re-appeal to the Ninth Circuit the same issues that court has already decided, would re-appeal the same issues to TECA, and would again pursue review in this Court.

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[15] Tenneco has apparently realized that nothing prevented it from moving for a new trial 10 days after judgment and has dropped that argument, which it had made to the Ninth Circuit.

[16] In any event, Tenneco was obligated to raise those arguments in its post-trial brief or, arguably, in its objections to the proposed findings and conclusions, at the latest. *See Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

II. Tenneco Question No. 2: Denial of Tenneco's Pretrial Motion for Disclosure.

A. Tenneco Argued Neither the First Amendment Nor Rule 26 to the Ninth Circuit Court of Appeals, and Did Not Even Raise the First Amendment to the District Court.

Almost one-half of Tenneco's Petition, pp. 16-28, is addressed to legal issues Tenneco did not preserve below. Tenneco argues here that the district court violated the First Amendment and Rule 26(c) of the Federal Rules of Civil Procedure in denying Tenneco's pretrial disclosure motion. However, Tenneco argued neither of these issues to the Ninth Circuit and raised only the Rule 26 issue to the district court, not raising the First Amendment issue in the district court until its post-trial motion, which was granted and therefore cannot be at issue here. In such circumstances, these questions are not properly before this Court.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); see *Neeley v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967); Sup. Ct. Rule 17.1(a), (c). A petition presenting issues not preserved "in the last court prior to Supreme Court review" contains a jurisdictional defect. Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 Va. L. Rev. 197, 200 (1975).

As shown by Tenneco's Opening and Reply Briefs in the Ninth Circuit, Opp. App. 1a-12a, Tenneco *never argued* the First Amendment or Rule 26 to the Court of Appeals. It *presented* the issue as a First Amendment question, Opp. App. 2a, Question No. 6, *captioned* the disclosure portion of its argument in terms of First Amendment Rights, Opp. App. 4a, 9a, and *occasionally employed* the words "First Amendment," Opp. App. 3a, 7a, 9a, but it did not offer any First Amendment analysis or argument or cite a single one of the thirty-plus authorities it now relies on in Part II of its Petition. The Ninth Circuit panel consequently made no ruling on First Amendment or Rule 26 issues. As it noted,

> In addition, Tenneco captions one of its headings "The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department of Energy." Appellant's

Brief at 38. Tenneco never discusses this rather eye-opening contention.

Pet. App. 16a n.10. As to Rule 26 "good cause," Tenneco's Ninth Circuit briefs did not even mention the issue.

Nor did Tenneco raise the First Amendment to the district court on its pretrial motion for disclosure. While Tenneco told the Ninth Circuit in its Reply Brief that it *had* done so, Opp. App. 9a n.11, that reference was highly misleading. Each of the references in note 11 is to a paper filed by Tenneco on its successful *post-trial* motion to unseal the trial record. In its Petition here, Tenneco refers the court to filings regarding the "disclosure argument," Petition at 17 n.11; the last four references to the Excerpts of Record below again are to papers filed in connection with the successful *post-trial* motion.

Tenneco's Petition seems to be questioning the trial closure, but this is another issue Tenneco never raised in the Ninth Circuit; it made only a passing reference to the closure and presented no argument regarding its propriety. Indeed, the closure was not even an issue in the district court—as noted, Tenneco's counsel made no objection when Kern's counsel asked that proceedings be closed. Pet. App. 46a. A party may not sit idly by watching a supposed error being committed, and then raise it on appeal. *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184 (10th Cir. 1985); *see Tyrrell v. District of Columbia*, 243 U.S. 1 (1917) (writ dismissed when record disclosed complaining party had not objected in trial court); *Templeman v. Chris-Craft*, 770 F.2d 245, 248 (1st Circ.), *cert. denied*, 474 U.S. 1021 (1985) ("A party may not appeal from an error to which he contributed by failing to object.").

B. The Ninth Circuit Decision Cannot Possibly Conflict with the Decisions of This Court or Other Courts of Appeals, and the Particular Facts of This Case Do Not Lend Themselves to a Decision by This Court That Could Have Any General Application.

Tenneco argues that "the decision below" conflicts with this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and decisions of the Third, Sixth, Seventh and Eleventh Circuits on the relationship between civil discovery and the First Amendment. But the pertinent "decision below"—the Ninth

Circuit's decision—does not address these issues, because Tenneco did not raise them there. While there may well be conflict among the circuits, none is raised by this case and none would be resolved by taking it for review.

There are further reasons why this case is far from an "ideal vehicle," Petition at 27, to address the perceived Circuit conflict. The fact that disclosure here was sought by a party that wished to turn civil discovery documents over to a government agency is a circumstance that does not frequently occur and presents particular concerns that can affect the decision. *See GAF Corporation v. Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976). Similarly, instances of abuse of the discovery process and harassment of the opposing party such as occurred here present special considerations that do not regularly arise in the district courts and can control the decision. *Seattle Times*, 467 U.S. at 35-36; *see* n.19, *infra*.

C. The Case Presents No Public Interest or Public Policy Question.

Except for Tenneco's own judicially-determined fraud upon Kern and violation of the regulations in its dealings with Kern, this case presents no "fraud," no "coverup," and no violation of law. ERA, in its September 27, 1987 response to Kern's objections to the PRO, acknowledged that its complaint against Kern was "not predicated on any claim of 'fraud' . . . ." The ERA complaint is based on an *ex post facto* theory of liability that assigns wrong to transactions that were wholly in compliance with the regulations in effect at the time. As noted, its basic theory of liability has only once been tested beyond the agency level, and was there rejected. *Canal Refining, supra*.

Tenneco's dogged pursuance of an issue in which it has no interest is and always has been pure retaliation and harassment in violation of ethical and procedural rules as well as DOE regulations. Tenneco abused the discovery process and is acting for its own reasons, not out of any public spirit or public "duty." Tenneco argues that "[e]very day of delay in disclosing the information allowed the concealment of the fraud from DOE to be perpetrated." Petition at 28. If Tenneco was acting purely for altruistic reasons, one must then ask why Tenneco waited until five and a half months

after the trial to move to unseal the trial record.[17] The district court, at the August 4, 1986 hearing on Tenneco's post-trial motion, articulated a "sense of skepticism about Tenneco's commitment to the fundamental principles of the First Amendment."

Tenneco argues "it must be" the law that no court can prevent a party from reporting facts to the government, Petition at 29, and attempts to distinguish, *id.* n. 25, the line of cases holding that in circumstances such as those presented here, disclosure should not be allowed. In *GAF v. Kodak, supra*, Judge Frankel rejected just such a "public policy" argument:

> It may be that the sometimes romantic notion of the "private attorney general" should entail collaborative activity alongside the public attorney general. If that is to become an agreed conception, however, it should happen as a judgment of legislative policy, not as a judicial inference from rules fashioned for purposes of discovery in private litigation.

415 F. Supp. at 133; *see Data Digests, Inc. v. Standard & Poor's Corp.*, 57 F.R.D. 42, 44 (S.D.N.Y. 1972).[18] Tenneco's counsel conceded, at the August 4, 1986 hearing on the post-trial motion, that "the language of Judge Frankel . . . is very meaningful in the discovery phase," and that "*GAF* had to do with precisely what was going on in this courtroom and properly referred to until the trial happened." The district court here "fully agree[d]" with the *GAF* line of cases, Pet. App. 26a, and Tenneco never disputed that conclusion in its appeal to the Ninth Circuit.

In this case, contrary to the allegations in Tenneco's Petition at 29, the DOE could have obtained the documents Tenneco disclosed directly from Kern through its lawful investigatory powers under 15 U.S.C. § 754(a)(1), 15 U.S.C. § 772(e), and 42

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[17] Kern suspects that Tenneco's sudden sense of public "duty" was prompted by the Ninth Circuit's decision the previous month affirming Kern's damage award and the dismissal of Tenneco's counterclaims in the related overcharge case. *Kern Oil & Refining Co. v. Tenneco Oil Company*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987). *See also* n.4, *supra*.

[18] The district court decision in *GAF* remains good law, and is not contradicted by *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979), where the intervening expansion of the Justice Department's investigatory powers under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 allowed it to obtain civil discovery documents. There is no comparable legislation authorizing the DOE to obtain private discovery documents.

U.S.C. § 7255. In this case, while no Fifth Amendment assumptions underlay the protective order, it specifically provided that discovery information would be used only for purposes of the litigation. Pet. App. 84a. In this case, Tenneco abused the discovery process.[19] Tenneco cites *Essex Wire Corporation v. Eastern Electric Sales Company, Inc.*, 48 F.R.D. 308 (E.D. Pa. 1969), for the proposition that "a litigant 'may make any lawful use' " of information obtained in discovery, but in *Essex* the court noted that the case before it presented "no reason to doubt the good faith" of the party seeking to disclose information to the government, *id.* at 312; here, there is ample reason to doubt Tenneco's posture as a good citizen.

The DOE and, if necessary, the courts, in the proper sequence of review, will decide whether Kern has violated the regulations and whether recompense is due to the government and injured parties, if any. Kern maintains that it did not commit any violation and is vigorously contesting the charges against it. But in any event, any public interest or public policy concerns will be protected in the DOE proceedings, and public policy does not require that this Court address the district court's decision denying Tenneco's pretrial disclosure motion.

Finally, we note Tenneco's admission that this case does not involve the public's right of access, Petition at 26, despite Tenneco's repeated references to the closure of the trial and repeated reliance on public access cases.

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[19] For this reason, the district court's decision was wholly consistent with *Seattle Times*, where this Court stated:

> Whether or not [Rule 26] itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent "equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices." [citation omitted] The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.

467 U.S. at 35-36, quoting *International Products Co. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (Friendly, J.).

D. Resolution of the Question Raised by Tenneco Would Have No Effect on the Outcome of This Case.

As explained above, the only way in which disclosure to the DOE could have affected the case before the district court would have been if the DOE had revoked the exception relief relied upon by Kern in its calculation of the damages caused by Tenneco. And when Tenneco went to the DOE with its story, explicitly asking the DOE to revoke Kern's exception relief, the DOE rejected that request. Ct. App. ER 4575.

Tenneco also argues that Kern's third party dealings show that it would not have refined the Yowlumne crude had Tenneco delivered it. The short answer to this contention of fact is that the district court allowed Tenneco to present the evidence of the third party transactions attempting to prove its point, and the court, as trier of fact, found against Tenneco. As the Ninth Circuit observed, there was "a great deal of evidence" before the district court on what Kern would have done with the crude. Pet. App. 17a. The district court found that "the credibility of a number of Tenneco witnesses was eroded," and especially noted the misleading nature of the testimony of one of Tenneco's experts on this issue. Pet. App. 41a-42a. The district court found Kern's evidence "more persuasive," *id.*, despite Tenneco's contentions that its evidence cast doubt on the credibility of Kern's witnesses. There is no reason to believe that the district court's factual findings on this question would be changed by the existence of the allegations in ERA's administrative complaint, the same allegations Tenneco made at trial.

Tenneco points to post-trial statements Kern made in response to the ERA complaint, alleging that Kern there took a position contrary to its position at trial. Tenneco has consistently misrepresented what Kern said, but its statement here is outrageous. Tenneco says, Petition at 8, "Kern was now arguing before DOE . . . that it would not have refined any additional price-controlled *Tenneco* oil." Kern said no such thing, and Tenneco knows it. Kern never mentioned the Tenneco oil. It said to the DOE that it would have sold, not refined, "primarily low-gravity," "severely disadvantaged" crude oil. The Tenneco Yowlumne crude was neither. The district court had before it evidence presented

by Tenneco showing that Kern sold some Yowlumne crude; it also had evidence showing that Kern would have refined most of the Yowlumne that Tenneco wrongfully withheld. The district court, as trier of fact, weighed the evidence and found in Kern's favor. There is thus no reason to expect that the district court would change its mind on the facts if presented with Kern's statement to the DOE.

Tenneco never had any legitimate reason for pursuing the issue of Kern's supposed "fraud." The district court, at the May 10, 1985 hearing on pretrial disclosure, noted its concern "about the proceedings in this case being used to stimulate proceedings before the DOE and FERC;" OHA, in its denial of Tenneco's petition for revocation of Kern's exception relief, noted the "attenuated relationship" between Tenneco's grievance and Kern's supposed regulatory violations. Tenneco had and has no interest in the questioned third-party transactions and it stands to gain nothing in the remedial proceedings now taking place. Once the DOE rejected Tenneco's petition for revocation of Kern's exception relief, Tenneco lost even the pretense that Kern's third party dealings could be of relevance in this lawsuit.

E. In Any Event, the District Court's Decision Was Correct and Fair.

As noted, the district court allowed Tenneco to present its evidence of the questioned third-party transactions and found that even if Kern had violated the regulations, the DOE would not revoke the exception relief relied upon by Kern. (And that, of course, was precisely the way it turned out.) As trier of fact, the district court found that Kern would have refined the Tenneco Yowlumne crude at issue, based on the court's evaluation of the witnesses' credibility and the "great deal of evidence" before it, including the evidence of the third-party transactions now before the DOE. The district court's rulings were manifestly correct and fair.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

EXCERPTS FROM TENNECO'S OPENING BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6674
No. 87-5743

KERN OIL & REFINING CO.,
Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,
Defendant-Appellant.

Appeal From The United States District Court for the Central District of California
The Honorable Laughlin E. Waters
Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

1. Are Kern's claims for breach of contract barred by res judicata, in view of the prior judgment based on the same contract in *Kern Oil & Refining Co. v. Tenneco Oil Company*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987)?

2. Are Kern's claims barred by the four year statutes of limitations, as they were filed more than four years after the causes of action accrued?

3. Did Kern waive its claim for breach of contract by its course of performance and failure to give notice of breach until two years after the contract had terminated?

4. Did the district court commit error in excluding evidence that Tenneco would have terminated the contract had Kern given notice: (a) that Tenneco had breached the contract; or (b) that Kern asserted the right to purchase uncontrolled oil at the controlled price?

5. Did the district court commit error in awarding Kern damages for a period of 20 months based on a contract which was terminable on 90 days' notice?

6. Did the district court violate Tenneco's First Amendment rights by preventing Tenneco from petitioning the Department of Energy (DOE) to revoke orders based on Kern's fraud?

7. Does the $60 million Proposed Remedial Order issued by the DOE against Kern based on Kern's fraud demonstrate that the district court's findings are clearly erroneous and that Tenneco is entitled to a new trial?

8. Did the district court commit error in awarding *prejudgment* interest at the *postjudgment* rate?

9. Did the district court have jurisdiction to enter findings and conclusions after Tenneco had filed its Notice of Appeal and more than 10 days after entry of judgment, thus depriving Tenneco of its right to move to alter or amend the findings or for a new trial?

10. Did the district court commit error by awarding sanctions against Tenneco under Fed. R. Civ. P. 11 for filing post-trial motions, one of which the court granted?

STATEMENT OF THE CASE

. . . .

A. *Course Of Proceedings Below*

. . . .

In April 1985, some eight months before trial, Tenneco uncovered documents which demonstrated that Kern had systematically defrauded the DOE during the period for which it was seeking damages from Tenneco. (ER II:603, 607; VI:3486). Tenneco immediately moved the district court for an order permitting Tenneco to disclose the documents to the DOE in order to permit the DOE to institute an enforcement action against Kern which would result in the revocation of DOE orders on which Kern was relying in this litigation. (*Id.*). That action would have reduced Kern's damage claim by several million dollars. (ER VI:3736, 3743, 3745; *see* Section VI A, *infra*). Despite Tenneco's timely application, the district court denied the motion to disclose in October 1985, holding that although Kern had not carried its burden of demonstrating that the material was confidential, disclosure to the DOE at that time might delay the trial. (ER I:207).

When evidence of Kern's fraud was presented at trial, the district court sealed the courtroom, excluded the press and public, and sealed the record. (ER IV:1895-98). Following trial, Tenneco moved the district court for an order unsealing the trial transcripts and exhibits in order that Tenneco could exercise its First Amendment right to petition the DOE. (ER II:963). Not until Tenneco sought a writ of mandamus from this Court and Kern unsuccessfully sought a stay from this court and the Supreme Court, was Tenneco able to provide evidence of Kern's fraud to the DOE in October 1986—a year and a half after Tenneco's initial application to the district court. (ER I:210; VII:4176-78).

On March 31, 1987, the DOE issued a Proposed Remedial Order seeking a refund from Kern of approximately $60 million based on the illegal transactions engaged in by Kern during 15 months of the 20 month damage period. (ER VII:3759). As a result of the district court's infringement of Tenneco's First Amendment rights, Tenneco was forced at trial to defend against

an artificially inflated damage claim supported almost entirely by only two witnesses—each of whom *actively participated in and directed Kern's fraudulent scheme.* (*See* Section VI A, *infra*).

* * * *

VI. THE DAMAGE AWARD IS NOT SUPPORTED BY THE RECORD AND MUST BE REVERSED.

A. *The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department Of Energy.*

In early 1985, Tenneco discovered documents which demonstrated that Kern had systematically defrauded the Department of Energy by engaging in a series of illegal transactions which substantially reduced Kern's obligation under the DOE regulations to purchase "entitlements" on price-controlled crude oil it refined. (ER II:603, 607; VI:3486). *See* Mandatory Petroleum Allocation Regulations, 10 CFR § 211.1-211.71 (1979) (Add. 13-76). That evidence was highly relevant to Kern's damage claim.

Kern relied in this litigation on DOE orders obtained in 1981 which granted Kern retroactive relief from purchasing entitlements during part of the damage period (October 1979-March 1980). (ER V:2419, 2511). Kern also claimed that it would have refined more price controlled oil during the remainder of the damage period. (*Id.*). Kern's reliance on those orders and assumptions increased its damage claim against Tenneco by some $5 million. (ER VI:3584-85, 3595-600). Further, Kern's unlawful scheme demonstrates that had Kern purchased additional price controlled oil, it would have evaded its additional entitlement obligations rather than pay them and later seek relief. (*Id.*). In addition, Kern's illegal transactions were orchestrated, supervised, and carried out by Kern's principal witnesses on liability and damages. (ER IV:1932-35, 1957-73; VII:3774-78). Proof of the illegality of that scheme would have cast grave doubt on their credibility and thus on Kern's entire case.

Tenneco filed a motion in April 1985 (some eight months before trial) requesting leave to disclose to the DOE specific documents which demonstrated Kern's fraud on the DOE, in order

to give the DOE an opportunity to revoke the orders on which Kern relied in this litigation. (ER II:603, 607). Tenneco's disclosure motion was necessary because all discovery was under a protective order which "deemed" all information "confidential." (ER II:615).

Although Kern was given repeated opportunities to demonstrate that the documents were "confidential" it failed to make that showing, as the district court expressly found in an order issued six months later on October 11, 1985. (ER I:207). The court nevertheless denied Tenneco's motion on the ground that disclosure at that time might delay the trial. (*Id.*). Tenneco was thus improperly prevented from petitioning the DOE for revocation of orders on which Kern relied and, as a result, Tenneco was prejudiced.

The district court closed the entire damage phase of the trial at Kern's request, excluded the public and press, and placed the trial transcripts and exhibits under seal. (ER IV:1895-98). The district court excluded Tenneco's expert testimony offered in rebuttal which demonstrated Kern's fraud on the DOE. (ER IV:2003-30).

Following trial, but before entry of judgment, Tenneco moved the court for an Order unsealing the trial transcripts and exhibits. (ER II:963, 1002). Not until Tenneco filed a petition for a writ of mandamus in this Court and Kern had been refused stays by this Court and the Supreme Court did the district court finally unseal the trial record, thus permitting Tenneco to present the evidence to the DOE and petition that agency for relief. (ER I:210; VII:4176-78). On October 3, 1986, Tenneco disclosed the relevant materials to the DOE. The agency immediately opened an investigation of Kern and, on March 31, 1987, issued a Proposed Remedial Order (PRO) against Kern seeking some $60 million in unlawful profits and interest based on Kern's fraud on the DOE's entitlements program during the damage period. 52 Fed. Reg. 18,270 (May 14, 1987) (ER VII:3759).

The purpose and effect of Kern's fraud is succinctly stated in the PRO:

> As a result of this practice, Kern reduced its post-entitlements cost of crude oil below that which it would have incurred if it

had properly reported its controlled tier crude oil receipts to the Entitlements Program.

. . . .

[The] transactions, as viewed under the regulations, never really took place. The documents and facial complexity of the transactions were designed, in fact, "for the purpose of camouflaging the real deal" from the DOE.

. . . .

Kern's purported sales served as a vehicle by which *Kern unlawfully evaded its obligations under the Entitlements Program*. . . .

Id. at 3771, 3777 (emphasis supplied). The Court is requested to take judicial notice of the PRO pursuant to *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 522-23 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (a court may take judicial notice of records of administrative bodies).

The district court's refusal to allow Tenneco to present this evidence to the DOE before trial forced Tenneco to go to trial on a wholly artificial basis against an illegally inflated damage claim. As a result, the district court entered a wholly erroneous judgment based on clearly erroneous findings. (ER I:272-73 Nos. 29, 30, 289-90 Nos. 46, 47, 48, 49, 50). The judgment is based on the *assumption* that Kern's miscertification of oil was proper and not unlawful. (ER I:272 No. 29, 290 No. 50). However, the PRO demonstrates the falsity of the district court's assumptions, the errors in the findings (written by Kern), and the impropriety of the judgment.

Had Tenneco been allowed to disclose Kern's conduct to the DOE in a timely manner in April 1985, the district court would have had the benefit of the DOE's informed and authoritative views on Kern's conduct, and the trial of this matter might well have taken an entirely different course. The credibility of Kern's key witnesses on liability and damages (LeDoux and Eveland) would have been severely damaged, since—as confirmed by the PRO—they were the principal participants in Kern's illegal scheme. (ER

IV:1932-38; V:2428, 2567, 2602, 2621, 2663; VI:3001, 3109, 3469; VII:3774-76).

The denial of Tenneco's pre-trial disclosure motion prevented Tenneco from petitioning the DOE in a timely manner, thus violating its rights under the First Amendment. As a result, Tenneco was denied a fair trial on issues central to Kern's case on both liability and damages and the judgment should be reversed.

* * * *

CONCLUSION

. . . .

The trial court violated Tenneco's First Amendment rights by preventing Tenneco from petitioning the DOE to rescind orders upon which Kern relied in this litigation; the court then closed its eyes to willful and deliberate violations by Kern of DOE regulations, finding that there was "no evidence" that oil was miscertified. (ER I:290 No. 50). Having prevented Tenneco from proceeding directly before the DOE to challenge the orders, the district court held that Tenneco could not "collaterally attack" the DOE orders in court, either. (ER I:257-58). As the recently issued Proposed Remedial Order of the DOE demonstrates, the DOE believes that it was systematically defrauded by Kern and the district court's findings to the contrary are thus clearly erroneous. (ER VII:3770-79).

* * * *

APPENDIX B

EXCERPTS FROM TENNECO'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6674
No. 87-5743

KERN OIL & REFINING CO.,

Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,

Defendant-Appellant.

Appeal From The United States District Court for the Central District of California
The Honorable Laughlin E. Waters
Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

APPELLANT'S REPLY BRIEF

INTRODUCTION

. . . .

Further, Kern's Statement of Objections filed in the DOE's Proposed Remedial Order ("PRO") proceeding against it requires that the judgment below be reversed. ER VIII:4613-4757. Kern represents in its Brief in this Court that it would have purchased and refined Tenneco's price controlled oil. Kern Br. at 43-45. Yet only one week before it filed its Brief, Kern admitted in its Statement of Objections that price controlled oil was too expensive, that it would *not* have purchased additional price controlled oil, and that it instead would have reduced its refinery runs rather than purchase and refine price controlled oil. ER VIII:4622-23, 4627, 4658, 4669-70, 4688-89.

Kern's position in the PRO proceeding is precisely that urged by Tenneco at trial, and makes clear that Tenneco was prejudiced by the district court's refusal to allow Tenneco to disclose Kern's fraud to the DOE before trial. *See* Tenneco Br. at 38-46. Had that disclosure occurred, Kern's key damages witness, Eveland, who masterminded the fraud on the DOE, never could have testified that Kern would have purchased and refined additional price controlled oil. Given Kern's admissions to the DOE, Kern's position in the district court and before this Court is untenable, and the judgment must be reversed.

ARGUMENT

* * * *

VI. TENNECO WAS PREJUDICED BY THE DISTRICT COURT'S DENIAL OF ITS FIRST AMENDMENT RIGHTS.

Kern's Statement of Objections to the DOE's Proposed Remedial Order demonstrates clearly the prejudice suffered by Tenneco as a result of the district court's erroneous denial of Tenneco's motion to disclose Kern's fraud to the DOE prior to trial.[11] Had

[11] The district court's violation of Tenneco's First Amendment rights was briefed below at ER II:963, 1002, 1077.

the district court granted that motion, Kern would have been unable to advance the arguments it did throughout the trial and its key witnesses could not have testified as they did. Kern's factual representations to the DOE directly contradict the factual representations it made to the district court—and those representations were adopted by that court. Kern's Statement of Objections demonstrates that the district court's findings are clearly erroneous.

A significant portion of Tenneco's oil that Kern claims it would have refined was price controlled oil. Tenneco presented evidence below that it was not in Kern's economic interest to purchase additional price controlled Yowlumne oil from Tenneco, since it was more expensive to Kern when DOE entitlement obligations were considered. Thus, Kern would not have refined that oil and its "lost profits" claim should be reduced by at least $5 million. *See* Tenneco Br. at 38-46; ER VI:3736, 3743, 3745; CR 358 at 27.

Kern's Brief in this Court states that:

> Kern's damage claim assumes that it would have refined most (not all) of the withheld Yowlumne crude and calculates the additional profits it could have made by doing so.

Kern Br. at 43.

> The district court found that "[h]ad the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and *not sold*. . . ."

Kern Br. at 45 (emphasis added). Finding No. 28, written by Kern—not the district court—states:

> Kern would have processed, *not sold*, 1,872,314 barrels of the non-delivered Yowlumne crude from April 1979 through November 1980. *It would have been sound business practice to do so*. . . .

ER I:271, No. 28 (emphasis added).

Contrast those factual representations with Kern's Statement of Objections to the DOE, filed on July 10, 1987:

> . . . Kern . . . had literally no alternative but *to sell* severely disadvantaged *price-controlled crude oil* if they wished to remain viable.

ER VIII:4627 (emphasis added).

> . . . Kern undertook these transactions in an effort to reduce its substantial crude oil costs. Had DOE announced while controls were still in effect the position it is now advancing for the first time, *Kern would most likely have sold the price-controlled crude in any event* because of its unacceptably high post-entitlements cost, and if unable to acquire exempt crude oil would have cut its refinery runs to reduce the adverse impact.

ER VIII:4669-70 (emphasis added).

> In these transactions, Kern was legitimately attempting to optimize its entitlements position under the regulations by *reducing its receipts of price controlled crude oil.* . . .

ER VIII:4688-89 (emphasis added).

Those factual representations by Kern are directly contrary to Kern's representations and testimony in the district court and in this Court that Kern would have purchased and refined additional price controlled oil. *See* CR 360 at 2-4, 11-14. Kern's statements to the DOE are admissions on which this Court may rely. *Fernhoff v. Tahoe Regional Planning Agency*, 803 F.2d 979, 985 (9th Cir. 1986); *United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980). Those statements demonstrate that the district court's findings are clearly erroneous and that the damage award is overstated by at least $5 million.

Kern's recent admissions to the DOE also render irrelevant Kern's arguments regarding the DOE's 1981 "exception" orders. *See* Kern Br. at 39-42. Since Kern has admitted that it would not have refined additional price controlled oil, it never would have incurred additional entitlements costs from which it would later seek exception relief. Kern's damage claim thus is improperly

inflated regardless of whether the DOE ultimately decides to revoke its 1981 exception orders because of Kern's fraud.[12]

* * * *

CONCLUSION

. . . .

Kern's recent admissions in the DOE directly contradict the factual basis for the decision below and demonstrate that the findings are clearly erroneous.

* * * *

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[12] Kern's Brief also misrepresents the DOE's action on Tenneco's Petition for Special Redress. Kern states, "Tenneco's contention that it was forced to go to trial 'on a wholly artificial basis against an illegally inflated damaged claim,'. . . is demolished by the DOE's denial of its petition." Kern Br. at 40. DOE did no such thing, and its letter disclaimed any such effect. Tenneco's petition was dismissed (not denied) "without prejudice to refiling at any time," and that was done because the DOE regarded the PRO proceeding as the more appropriate vehicle to address the matters raised by Tenneco's petition. ER 4575-76, 4579. The letter cited by Kern states, "I wish to make clear that there is a substantial basis for finding a violation, should Kern have actually engaged in the transactions alleged by Tenneco." ER 4576-77.

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(a)

RULE 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.